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IN THE

Supreme Court of the United States

October Term, 1968
No. 945

EUGENE HOLDEN, JOE BRANDON, JOHN ROSAKOS, NATHAN DeLUCA, JOSEPH GROSS, JOSEPH RICHARD TOUART, HAROLD HOLDEN, MARK S. HOLDEN, BERNARD SWEENY, WILLIAM BLAIR MILES, and HENRY BRANDON,

Plaintiffs and Appellants,

vs.

ROGER ARNEBERGH, City Attorney for the City of Los Angeles; EVELLE J. YOUNGER, District Attorney for the City of Los Angeles; THAD BROWN, Chief of Police for the City of Los Angeles; PETER J. PITCHESS, Sheriff of the County of Los Angeles; THOMAS J. LYNCH, Attorney General of the State of California,

Real Parties in Interest and Respondents.

MOTION TO DISMISS OR AFFIRM.

ROGER ARNEBERGH,
City Attorney,
ROBERT B. BURNS,
Assistant City Attorney,
JOHN A. DALY,
Assistant City Attorney,
GEORGE J. FRANSCELL,
Deputy City Attorney,
2100 City Hall,
Los Angeles, Calif. 90012,
Attorneys for Real Parties in Interest and Respondents Roger Arnebergh and Thad F. Brown.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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EUGENE HOLDEN, *et al.*,

Plaintiffs and Appellants,

vs.

ROGER ARNEBERGH, etc., *et al.*,

Real Parties in Interest and Respondents.

MOTION TO DISMISS OR AFFIRM.

Respondents Roger Arnebergh, City Attorney for the City of Los Angeles and Thad Brown, Chief of Police of the City of Los Angeles, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal heretofore filed with this Honorable Court in the above entitled case be dismissed, or, in the alternative, that the final judgment and decree of the Court of Appeal of the State of California, Second Appellate District, Division One, as reported 265 ACA 103 and 71 Cal.Rptr. 401 be affirmed on the grounds that:

(a) That the appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to these rules.

(b) That it does not present a substantial federal question.

(c) That the judgment rests on adequate non-federal bases.

Statement.

Appellants appeal from an order of the California Supreme Court denying a hearing on the decision and order of the Court of Appeal of the State of California, Second Appellate District, Division One, dated August 21, 1968, affirming the judgment of the Superior Court below in dismissing a complaint for declaratory relief, injunction and conspiracy and awarding costs.

ARGUMENT.

(a) No substantial federal question is presented in that as to these respondents the Jurisdictional Statement (page 12) affirmatively shows that costs were filed and claimed by respondents Evelle J. Younger and Peter J. Pitchess but no costs were filed or claimed by these respondents and as to them the constitutionality of California Government Code Section 951 is moot.

(b) No substantial federal question is presented as to these respondents as to the legality of the arrests allegedly made under their direction, in that in appellants' complaint for declaratory relief, injunction and conspiracy [C. T. 82-97] appellants allege that they were "arrested in the manner set forth in paragraph XIV of their first cause of action" which paragraph XIV alleged that

> ". . . an arrest is made by a policeman either without a warrant or on the basis a warrant is issued by a magistrate of the applicable municipal court pursuant to a complaint filed. . . ."

The instant case involves a total of approximately 17 separate novels or paperbacks, sexual photos and an undeterminate number of films, all of which were available to appellants in multiple copies. As described in Paragraph XI, First Cause of Action of Plaintiffs' Second Amended Complaint—the material involved was legally purchased or obtained prior to any arrest, and reviewed as to its obscenity or non-obscenity by the prosecuting authorities designated by state law to decide the question for the purpose of initiating prosecution. (Section 26500 *Government Code*; Section 691 *Penal Code*; Section 42(8) of the *Los Angeles Charter;* Section 72193 *Government Code.*) Whether or not the arrest should be made on the basis of the material legally obtained and reviewed, whether to proceed by warrant or otherwise was the decision of the prosecuting attorney and his staff, not the sole decision of the arresting officer.

Considering the vast amount of material of this type that is flooding the country in the form of novels, paperback books, magazines, advertising pamphlets, so called comic-books—underground newspapers, picture books and photographs, any decision by a Court to equate the procedure followed in this case with the peremptory arrest in *Flack* or the wholesale seizures in *Marcus v. Search Warrant,* 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708; *Stanford v. Texas,* 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506; *Aday v. Superior Court,* 210 Cal. App. 2d 229; or *A Quantity of Books v. Kansas,* 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723, raises the following questions which must be resolved by the Court.

1. Will the task of reviewing each one of the hundred of items now reviewed by the prosecuting attor-

neys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdiction of responsibility owed to the public at large to control the spread of pornography?

2. Can the Courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material? (See A Report To The California Legislature dated April 6, 1967 from the Attorney General Thomas C. Lynch.)

3. Will the Court's preemption of the tasks now assigned by statutory law to prosecuting attorneys in deciding what is or it not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decision in *Redrup v. New York,* 386 U.S. 767 and the fourteen separate opinions handed down the same day by the United States Supreme Court in *A Book Named "John Cleland's Memories of a Woman of Pleasure et al. v. Attorney General,* 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975; *Ginsburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 and *Mishkin v. State of New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958.

Examples of the quantities of books, magazines and other publications involved in some of the decisions cited in *Flack v. Municipal Court, supra,* are set forth in those decisions. In *Marcus v. Search Warrant, supra,* there were 280 publications; in *Aday v. Municipal Court,* 62 publications; in *Stanford v. Texas, supra,* approximately 2000 publications; in *Quantity of Books*

v. Kansas, supra, some 31 publications; in *Mishkin v. State of New York, supra,* some 72 paperback publications.

4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials where the volume and quantity of such material renders prior judicial scrutiny a barrier to public protection.

See:

Schackman v. Arnebergh (1966), 258 F. Supp. 983;

Pinkus v. Arnebergh (1966), 258 F. Supp. 996.

5. No law enforcement official is required to give guidelines and opinions regarding possible obscenity nor is any law enforcement official required to provide a board of review to pass on the obscenity or lack thereof of material.

See:

Schackman v. Arnebergh (1966), 258 F. Supp. 983;

Pinkus v. Arnebergh (1966), 258 F. Supp. 996.

6. The California Supreme Court in ***Flack v. Municipal Court,*** 66 Cal. 2d 981, at 993 (f.n. 13) expressly declined under the facts there presented to

> "ascertain whether it is feasible for the magistrate to examine the allegedly offending film or hold an adversary proceeding prior to issuing a warrant . . . ."

(c) The judgment and decree of the Court of Appeal in affirming the judgment of the Superior Court below rests on adequate non-federal grounds, in that:

(1) Declaratory and injunctive relief were properly denied.

"Where the Plaintiff has another remedy that is speedy and adequate, and as well suited to Plaintiff's needs as declaratory relief, it is proper to refuse declaratory judgment." (*People v. Ray,* 181 Cal. App. 2d 64; *Broffman v. Klassman,* 183 Cal. App. 2d 117; *Walker v. Munro,* 178 Cal. App. 2d 67; *Wieber v. Worton,* 105 Cal. App. 2d 626; and 15 *Cal. Jur.* 2d "Declaratory Relief", Section 23 at page 142).

This same principle is applicable in suits for injunctive relief (*Manchel v. County of Los Angeles,* 245 Cal. App. 2d 501, and *Citizens' Committee for Old Age Pension v. County of Los Angeles,* 91 Cal. App. 2d 658).

Appellants had available to them a Motion to Suppress and/or Return the Material Seized (Sections 1539 and 1540, *Penal Code*). In addition, this remedy is also available where the material in question has been seized without a warrant (*People v. Gershenhorn,* 225 Cal. App. 2d 122) and the fact that the subject matter of the pending lawsuit was a misdemeanor prosecution matters not. (*People v. Justice Court,* 185 Cal. App. 2d 256).

If the Motion to Suppress were denied, the moving party need not rely upon a time-consuming appellate procedure, but might apply directly for a Writ of Mandate (*People v. Gershenhorn,* 225 Cal. App. 2d 122).

Thus, wherease here the Appellants in the criminal prosecution had the constitutional, as well as statutory right, to a speedy trial and likewise had available to them the right to petition for a Writ of Mandate, they, the Appellants, had another remedy that was as speedy, if not more so, and as adequate and as well suited to their needs as this action for declaratory and injunctive relief.

The procedures afforded by California law for the enforcement of Penal Code Section 311.2 meet constitutional requirements of due process.

> "If the procedure prescribed by the State actually affords the character of due process contemplated by the federal Constitution, and is followed, there is no denial of the right under the federal constitution. While if it does not, or is not followed, the right has been violated. Smith v. State of Texas, 311 U.S. 128, 61 S. Ct. 114, 85 L. Ed. 84; Hill v. State of Texas, 316 U.S. 400, 62 S. Ct. 1159, 86 L.Ed. 1559." (*Mueller v. Powell* (C.A. 8, 1953), 203 F. 2d 797, 800).

California laws relating to arrests and searches meet the fundamental criteria and standards required by the federal Courts in applying Constitutional standards. (*Ker v. California* (1963), 374 U.S. 31, 10 L. Ed. 2d 726, 83 S. Ct. 1623.) While denial of a motion to return, like denial of a motion to suppress is not reviewable on appeal, a discretionary review by writ of mandate is available (*People v. Gershenhorn,* 225 Cal. App. 2d 122, 124-126).

California obscenity statutes, as amended in 1961, are in accord with the constitutional requirements laid

down and discussed in *Mishkin v. New York,* ..... U.S. ....., 86 S. Ct. 958, 16 L. Ed. 2d 56, and *A Book named John Cleland's Memoirs v. Attorney General,* .... U.S. ...., 86 S. Ct. 975, 16 L. Ed. 2d 1. As stated in *Mishkin* at page 61, "The New York Courts have interpreted

> "'obscenity in §1141 to cover only so called 'hard core pornography' See *People v. Richmond County News, Inc.,* 9 NY 2d 578, 586-587 . . . Since that definition of 'obscenity' is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of §1141 below".

The same statement, but substituting Penal Code Section 311.2 and *Zeitlin v. Arnebergh,* 59 Cal. 2d 901 for the statute and case cited, can be said of the California Courts and the constitutionality of its obsecnity laws.

The California statute, by use of the word "knowingly" defined therein to mean "having knowledge that the matter is obscene" satisfies the constitutional requirement of scienter as pointed out in *Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215. (*Mishkin v. New York* (*supra*), 16 L. Ed. 2d at pages 62, 63).

The control of obscenity by criminal prosecutions, under proper standards, is constitutional (*Alberts v. California,* 354 U.S. 476, 495, 1 L. Ed. 2d 1498, 1513, 77 S. Ct. 1304; *Kingsley Books v. Brown,* 354 U.S. 436, 440, 1 L. Ed. 2d 1469, 1473, 77 S. Ct. 1325). A state is not limited in the remedy it selects so long as due process is observed (*Kingsley Books v. Brown*

(*supra*), cited in part in *Times Film Corp. v. Chicago* (1961), 365 U.S. 43, 50, 5 L. Ed. 2d 403, 408, 81 S. Ct. 391).

Neither the California statute nor the procedures provided by California law are so vague or standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and juries free to decide, without any legal fixed standards, what is prohibited and what is not in each particular case. (*Roth v. United States* (1958), 354 U.S. 476, 491, 1 L. Ed. 2d 1498, 1511, 77 S. Ct. 1304; *Kingsley Books v. Brown, supra,* 345 U.S. 436, 441).

For the reasons stated, it is respectfully submitted that the appeal should be dismissed, or in the alternative, that the judgment and decree of the Court of Appeal should be affirmed.

ROGER ARNEBERGH,
City Attorney,

ROBERT B. BURNS,
Assistant City Attorney,

JOHN A. DALY,
Assistant City Attorney,

GEORGE J. FRANSCELL,
Deputy City Attorney,

By ROBERT B. BURNS,

Attorneys for Respondents Roger Arnebergh, City Attorney for the City of Los Angeles and Thad Brown, Chief of Police of the City of Los Angeles.